No. 508

UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT,

Northern District of California.

GEORGE W. REED, ADMINISTRATOR, ETC., ET AL.,
Appellants,

vs.

JOHN A. STANLY, TRUSTEE, ETC., ET AL.,
Appellees.

Brief for John A. Stanly, Surviving Trustee, etc., and Asbury J. Russell, Peter L. Wheeler, and John A. Stanly, Trustees of the Samuel Merritt Hospital, Appellees.

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STATEMENT OF CASE.

From the record the following facts appear:—

On the 17th day of August, 1890, Samuel Merritt died in Oakland, Alameda County, leaving a large estate. He left surviving him three heirs at law, viz: his sister, Mrs. Catherine M. Garcelon, and two nephews, James P. Merritt and Frederick A. Merritt, the sons of a deceased brother. Mrs. Garcelon was a childless widow,

and, in case of her death, her presumptive heirs were the two nephews, James P. Merritt and Frederick A. Merritt. Samuel Merritt by his will gave to the nephews each a legacy of $50 per month for the period of ten years, and released to Frederick A. Merritt an indebtedness of $4,000. The balance of his large estate he gave to his sister, Mrs. Catherine M. Garcelon. This will was admitted to probate by the Superior Court of Alameda County in September, 1890. The two nephews, Frederick A. Merritt and James P. Merritt employed counsel to contest the will of their deceased uncle, and threatened proceedings looking to that end. Thereupon their aunt, Mrs. Garcelon, entered into a compromise agreement and family settlement with the two nephews by which she paid to them $125,000 in cash, and conveyed to J. N. Knowles, as a trustee for them, real and personal property of the value of $375,000. In consideration of this payment and conveyance the said two nephews released her from all claims upon the property derived under the will of her brother, Samuel Merritt. As these two nephews would be the only heirs at law of Mrs. Garcelon upon her death, they also covenanted and agreed, as a part of the consideration of this payment and conveyance to them, that they respectively relinquished all interest in her estate in case of her death, and solemnly covenanted that they would not in any shape, form, or manner contest any will or deed that she might thereafter make of her property, and acknowledged that they had already received a fair and just proportion of her estate. This settlement between Mrs.

Garcelon and her respective heirs was made on the 14th day of November, 1890.

On the 21st day of April, 1891, Mrs. Garcelon executed and delivered to John A. Stanly and Stephen W. Purington a deed of trust conveying to them the bulk of her remaining property, and all being property derived by her from the estate of her deceased brother. The trusts specified were that they should sell the property, and out of the proceeds pay out something over $200,000 to many different persons who were relatives, friends, and dependents of Mrs. Garcelon, and the balance of the property was to be divided into two parts — one part, being four-tenths of the said balance, was to go to Bowdoin College, a Maine corporation, the other six-tenths was to go to certain trustees for the founding and maintaining in the City of Oakland of a hospital, to be known as the "Samuel Merritt Hospital." Stanly and Purington entered into possession of this property under the deed of trust.

On the 18th day of November, 1891, and being about seven months subsequent to the execution of the deed of trust to Stanly and Purington, Mrs. Garcelon made her last will. It is found at pages 87, 88, and 89 of the transcript. A reading of the will shows that it was clearly intended to be in furtherance and confirmation of the prior deed of trust made by her to Stanly and Purington, and that she did not expect her residuary legatees, Harry P. Merritt and Stephen W. Purington, to receive any substantial benefit from the estate; her purpose, as she declares, in making them residuary legatees and devisees, was to enable them to enforce the deeds of

trust which she had theretofore executed to J. M. Knowles in favor of her two heirs at law. She thereby recognized and acted on the fact, that she had already by deed disposed of substantially all her estate.

Thereafter, and on the 29th day of December, 1891, Mrs. Garcelon died, and on the first day of February, 1892, her will was admitted to probate. (See pages 212–213.)

Thereafter, James P. Merritt, one of her heirs at law, filed his contest of the will of his deceased aunt. The grounds of his contest were that Mrs. Garcelon was incompetent, and that she was unduly influenced by Stanly and Purington. On the 7th day of August, 1893, the Superior Court of Alameda County, State of California, by its judgment duly given and made, dismissed the contest, and "adjudged that the said James P. Merritt had no interest in the estate of said Catherine M. Garcelon, and was estopped from contesting the validity of her said will." (Pages 213–214.)

James P. Merritt took an appeal to the Supreme Court of the State of California from this judgment dismissing his contest, and the judgment of the Superior Court was affirmed. (See *Estate of Garcelon*, 104 Cal. 570.) This was an adjudication that the heirs of Mrs. Garcelon were estopped from contesting any will or deed that she might make, and that they had no interest in her estate, nor in the property included in her deed to Stanly and Purington.

Pending the proceedings in the Probate Court in the matter of the estate of Mrs. Garcelon, and on the 23d day

of February, 1892, the President and Trustees of Bowdoin College, a corporation existing under the laws of Maine, together with a large number of other parties, all residents and citizens of States other than California, filed their bill of complaint in the Circuit Court against James P. Merritt and Frederick A. Merritt, the above-named heirs of Mrs. Garcelon, Thomas Prather, William E. Dargie, and also against John A. Stanly and Stephen W. Purington.

Stanly and Purington were made parties defendant, because they were the Trustees under the deed of trust made by Mrs. Garcelon in her lifetime above mentioned, and had refused, upon demand made by complainants, to bring suit against the defendants for the purpose of enforcing the provisions of the trust and quieting their title which they held for the benefit of the complainants as against the adverse claims set up by the other defendants. The bill of complaint alleged the circumstances going to show the injury resulting to the beneficiaries under the deed of trust of Mrs. Garcelon on account of these adverse claims. (See pages 34 and 35.) These alleged acts of the defendants, together with a full statement of the plaintiffs' beneficial interest in the property conveyed by the deed of trust, undoubtedly entitled the plaintiffs to some kind of relief. After stating fully the rights of the plaintiffs and that the defendants, the two heirs at law of Mrs. Garcelon were estopped from contesting the deed, and the action of the defendants affecting the plaintiffs' interests in the property, the bill of complaint alleges at page 37, paragraph eighth, that complainants have requested Stanly and Purington, as trustees, to

institute actions to quiet their title to the property conveyed to them under the deed of trust against the claims of the defendants, and to procure an injunction against James P. Merritt and Frederick A. Merritt from violating the covenants they had entered into with Catherine M. Garcelon in her lifetime, and to secure a specific performance of said covenants and agreements; that upon such demand being made, Purington and Stanly refused to accede to the complainant's request, and therefore they were made defendants. After the bill of complaint was filed, Stanly and Purington answered, admitting all of the allegations of the bill, except as to a portion of the real property. As to this realty they denied possession, and alleged that it had been conveyed during the lifetime of Mrs. Garcelon. They asked no relief whatever, their answer containing no prayer. Thomas Prather and W. E. Dargie answered, disclaiming any interest in the property or in the litigation, and denying any contracts with James P. Merritt and Frederick A. Merritt. James P. and Frederick A. Merritt demurred to the complaint. (See page 58.) One ground of their demurrer was that the Court had not jurisdiction of the action. This demurrer was overruled February 3d, 1893.

Bowdoin College v. *Merritt*, 54 Fed. Rep. 55.

A short time previously, however, Frederick A. Merritt filed his consent to a judgment being entered in favor of complainants, which was afterwards done.

On April 1st, 1893, James P. Merritt filed his answer (page 75). This answer contained a plea to the

jurisdiction of the court. The ground of the plea was that Stanly and Purington, the trustees, had not in good faith refused to bring suit, as alleged by complainants, but had themselves in reality brought this suit and were the real plaintiffs in the action, and that this was done in order to give the court jurisdiction, because if they had brought the action in their own names in a federal court it could not have been maintained, for the reason that they were citizens of the State of California.

On May 5th, 1893, an amended plea was filed (page 81 *et seq*) setting up substantially the same facts as a bar to the action. Exceptions to the amended plea were filed by complainants. After argument, the court decided that the plea was sufficient (page 93). Thereupon a replication was filed to the amended plea. The facts set up in the plea being at issue, the Court heard the testimony thereon.

Meanwhile the plaintiff filed an amended and supplemental bill on November 27th, 1893, bringing in Harry P. Merritt, one of the residuary legatees under the will of Mrs. Garcelon, as a party defendant. Harry P. Merritt having united with James P. Merritt they respectively made motions to dismiss the case, on the ground that the Court had not jurisdiction. The motions were made on the testimony taken in support of the plea (page 119).

On July 23d, 1893, the Court passed upon the testimony, and overruled the plea and denied the motions.

Bowdoin College v. *Merritt*, 63 Fed. Rep. 213.

This was in effect a finding of fact by the Court that

the allegations of the plea were not true. In the meanwhile, Stephen W. Purington died.

A second supplemental bill was then filed, bringing in George W. Reed, the administrator, with the will annexed, of Catherine M. Garcelon, deceased. Reed then made a motion to dismiss the bill. His motion was made on the same grounds and the same testimony upon which James P. Merritt and Harry P. Merritt based their motions, and upon which James P. Merritt based his plea (page 182). The court denied the motion (page 185). James P. Merritt, Harry P. Merritt, and George W. Reed then filed their respective answers, and the cause was then heard and tried, and on June 18th, 1896, a final decree in favor of plaintiffs was entered.

Bowdoin College v. *Merritt*, 75 Fed. Rep. 480.

The decree is at page 282. The defendants did not appeal to this Court upon the whole case and thereby bring before this Court for determination the question of whether or not the court below had jurisdiction, but took an appeal to the Supreme Court of the United States upon the question of jurisdiction alone. The appellants not having obtained a certificate under Section 5 of the Act creating the Circuit Court of Appeals, the Supreme Court dismissed their appeal May 24, 1897. (See 167 U. S. 745.)

Not satisfied with this the defendants procured the Circuit Judge to allow another appeal to the Supreme Court, which was perfected. This appeal was also dismissed. (See opinion and statement of the case in *Merritt* v. *Bowdoin College*, 169 U. S. 551.)

Thereafter and on the 1st day of April, 1898, George W. Reed, the administrator, with the will annexed, of Catherine M. Garcelon, and James P. Merritt filed in the Circuit Court a bill of complaint in the nature of a bill of review, making John A. Stanly and all the other parties to the prior suit, defendants.

It appears from this bill of review that the reversal of the judgment and decree of the court below is not asked for on the ground of anything affecting the merits of the controversy, but upon the same grounds urged in the pleas heretofore referred to, viz: that the court below was imposed upon by a collusive suit, one really brought by John A. Stanly and Stephen W. Purington, as trustees, and thereafter maintained by John A. Stanly as surviving trustee. That is to say, though the court below overruled the plea, thereby passing upon the facts involved and holding that the plea was not true and the action was not a collusive one and the Court was not imposed upon, the appellants now seek to have that judgment reviewed, on the ground that though the facts are true as found by the Court and alleged in the original bill of complaint, yet as a matter of law appearing upon the face of the pleadings, the Court had not jurisdiction.

Such being the case, we do not think it out of place to refer to

THE STATUS OF THE COMPLAINANTS.

There are two of them, James P. Merritt, one of the heirs of Mrs. Garcelon, and George W. Reed, the administrator, with the will annexed, of her estate. It has been adjudicated by the courts of California (see *Estate*

of Garcelon, 104 Cal. 570), that James P. Merritt has no interest in the estate of Mrs. Garcelon, and is estopped from claiming any interest therein by virtue of his contracts made with his aunt in her lifetime. This judgment is set out at pp. 213, 214. The judgment was based upon the same covenants set out in the original bill of complaint herein. We refer this Court to the learned and elaborate opinion of the Supreme Court of California written by Judge De Haven, holding that James P. Merritt has no interest in the estate of Mrs. Garcelon and has no standing in court. He cannot question, according to this decision, any disposition that Mrs. Garcelon has made of her property, and he was turned out of court, without a hearing, upon his allegations that his aunt was insane and was unduly influenced in making her will. The other complainant, George W. Reed, is the Administrator, with the will annexed of Mrs. Garcelon's estate, and in compliance with his duty as such administrator, contested the claims of James P. Merritt when he asked for a revocation of the will of Mrs. Garcelon. The grounds upon which Merritt contested this will, defended as we have said by Reed, were that Mrs. Garcelon was not competent to make a will, and that the will was the result of the undue influence of John A. Stanly and Stephen W. Purington. That is to say, James P. Merritt urged against the will precisely the same grounds that the appellants here allege against the deed, made to John A. Stanly and Stephen W. Purington more than six months prior to the execution of the will. Having secured from

the courts a final decree establishing the validity of the will, and that James P. Merritt is not interested in Mrs. Garcelon's estate, and is estopped from questioning her will or a deed of her property. Mr. George W. Reed turns around and unites with James P. Merritt in the federal court in an attack on the deed made April 21st, 1891, to Stanly and Purington. We submit that an inspection of the will shows a manifest intention on the part of the testatrix to cause the purposes of the deed of trust to be carried out. We therefore charge that Mr. Reed has violated his duty in entering upon this long and expensive litigation for the purpose of upsetting the disposition of the property made by his testate in her lifetime, and that he is not justified in exhibiting this bill of review, and that he ought not to be heard. He should be turned out of this Court as James P. Merritt was out of the California courts. The excuse which he offers in his bill of review for his action is that one N. Hamilton has obtained a large judgment against the estate of Mrs. Garcelon which he has not the funds to pay, unless he can recover it out of the property conveyed by Mrs. Garcelon to Stanly and Purington. By the law of California no administrator or executor can maintain any action at all to set aside a deed made by the deceased except for the reason above stated and set out at length on pages 276 and 277 of the record.

Field v. *Andrade*, 106 Cal. 107.

In order to bring about a speedy determination of this litigation, the defendants whom we represent obtained from the court below an order permitting them to file a

plea without waiving their demurrer. Thereupon John A. Stanly, as surviving trustee, and also as co-trustee with Asbury J. Russell and Peter L. Wheeler, as trustees of the Samuel Merritt Hospital, filed a plea setting up the fact that this judgment obtained by N. Hamilton against the estate of Mrs. Garcelon had been assigned for a valuable consideration to John A. Stanly, as trustee, etc. This plea also averred that Harry P. Merritt and the estate of Stephen W. Purington, being the only residuary legatees under the will of Mrs. Garcelon, had confirmed said deed of trust by accepting the payments of money which Mrs. Garcelon in said deed of trust directed her trustees to make to them. The plea also set up the facts showing that James P. Merritt had no interest in the property by reason of his covenants with and releases to his aunt. This plea, if the facts alleged in it are true, shows that the appellants George W. Reed, as administrator, and James P. Merritt, have absolutely no interest whatever in this litigation and cannot maintain it.

It is to this plea Judge Hawley refers in the statement in his opinion, page 310, dismissing the appellants' bill.

The appellants have not seen fit to print as a part of the record this plea on file in the case. The plea, however, can be found in the original records on file with the clerk of this court (pp. 792–894.) No replication has ever been filed to this plea. Substantially, the same facts contained in the plea do appear, however, in the printed records, except the assignment of the Hamilton judgment. These appellees contended in the court below

that in order to terminate the litigation they ought to be permitted to show at the very outset that the appellants had no interest in the property sufficient to enable them to maintain the action. In this matter Judge Hawley agreed with them, but the appellants refused to permit that to be done, and insisted that the demurrer be disposed of before the plea was considered.

On our part, we insist that this Court should follow the decisions of the California courts, and upon the facts as they appear in this record, and irrespective of the plea, hold that appellants have no standing in a court of justice.

If this Court does not agree with us on this proposition, it still must be obvious, when one considers the status of the appellants and the large interests involved under the trust deed, that the appellants are only entitled to such consideration as the strict rules of law compel the Court to give them. Without hope of ultimately succeeding in this litigation, the appellants nevertheless, prosecute it, thereby inflicting great injury upon the beneficiaries under the trust. The appellants are asking this Court to solve a legal conundrum in which they have no interest. If this Court listens to them it delays the closing of the trust and the distribution of the funds to the parties entitled.

We call attention to these facts in order to show that the appellants are not entitled to the slightest consideration beyond what the Court feels it is compelled to give them upon the legal propositions involved. Every doubtful question should be construed against them.

Besides, John A. Stanly, the surviving trustee, as in duty bound, did, intermediate between the dismissal of the appeal to the Supreme Court and filing this bill of review, pay more than $200,000 to the beneficiaries named in the deed of trust. The Court can, therefore, readily understand the painful position occupied by the trustee while these attacks on the trust are being made.

After the appellants refused to permit the matter of the plea to be taken up until their demurrer was disposed of, argument was had in the court below upon the demurrers, and after consideration the court below sustained the demurrers and dismissed the bill. The order of the Court is found at page 302 and is simply that "the demurrers are sustained, that said bill and amendments be dismissed, and that a decree be filed and entered herein accordingly." The decree, page 306 *et seq.*, declares that the appellants were guilty of such laches and delay in the exhibition of the said bill of complaint that they are not entitled to the, or any of the relief prayed for therein, and because of said laches and delay of the said complainants the Court ordered that the said demurrers be sustained and the said bill of complaint be dismissed with costs. The opinion of Judge Hawley in dismissing the bill is reported in *Reed* v. *Stanly*, 89 Fed. Rep. 430.

In appellants' statement of errors and parts of the record to be printed (page 2) the appellants in paragraphs 1, 2, 3, 4, and 5, rely upon the error of the Court in dismissing the bill for laches. The remaining errors specified assume that this Court is at liberty to take up and dispose of the bill of review on its merits in case it should

be of the opinion that the complainants have not been guilty of laches; but in designating the parts of the record to be printed it will be observed that the appellants only print such portions of the record now on file in this Court as tend to elucidate their point that they were not guilty of laches in the matter of filing their bill.

Large portions of the pleadings in the original action are omitted from the printed transcript, and this could only have been done upon the theory that this Court will only pass upon the question as to whether or not the complainants and appellants were guilty of laches.

ARGUMENT.

I.

Appellants are not Entitled to be Heard.

We ask the Court either to dismiss this appeal or to affirm the judgment of the court below, upon the ground that it appears affirmatively from the record that appellants have no standing in Court. That James P. Merritt cannot be heard to question any disposition Mrs. Garcelon may have made of her property has already been expressly decided after most elaborate argument by counsel, and full consideration by the Supreme Court of California in the case already cited. That decision is supported by a long line of authorities unexampled in uniformity and in number. The authorities cited by respondents in the *Estate of Garcelon*, 104 California, and referred to at pages 578, 579, 580, and 581, were

decisions where the courts held that an heir could not question a deed or will made by the ancestor if a contract had been made between the ancestor and the presumptive heir, by which in consideration of a present payment the heir released his claim upon the ancestor's estate. The following statement made by the Supreme Court of Kentucky, is fully justified:—

"The whole current of authority, both in this country "and in England, is, that a release by an heir apparent "of his estate in expectancy, with covenant of non-"claim, is, if made fairly and with the express consent "of the ancestor, or *a fortiori* if made with the ancestor, "a bar to the releaser's claim thereto by descent or "devise. In fact, after a careful examination, we have "been unable to find any recently adjudged case holding "to the contrary."

Daniel v. *Lewis*, 13 Kentucky L. R. 828.

We respectfully but firmly insist that the federal courts follow the decision of the California Supreme Court, and put an effectual quietus upon further disturbance of the trusts involved here, by turning Mr. Merritt out of court, on the ground that he has no interest in the litigation.

Whatever the opinion of this Court may be as to its right to turn Mr. Reed out, we urge an affirmance of the judgment as to James P. Merritt, on the ground of his non-interest. He is an intermeddler in that which does not concern him, and has vexed the federal courts and hindered the execution of great and worthy trusts too long.

We also insist that Mr. Reed does not occupy a position giving him a right to invoke the assistance of this, or any other court, to set aside a deed by Mrs. Garcelon in her lifetime. Besides, he has had his day in court. He gives no good reason why he should again be heard.

II.

The dismissal of the appeal by the Supreme Court was an affirmance of the judgment. "The general rule "is that the dismissal of an appeal by an appellate court "without an examination of the case upon its merits "operates as an affirmance of the judgment."

Duntermann v. *Story*, 58 N. W. 951;
Karth v. *Light*, 15 Cal. 324;
Rowland v. *Kreyenhagen*, 24 Cal. 52;
Chase v. *Berand*, 29 Cal. 138.

If the judgment of the Circuit Court was affirmed by the Supreme Court in dismissing the appeal a bill of review will not lie.

Southard v. *Russell*, 16 How. 547, 570.

III.

A bill of review ought not to be entertained where, in a case like this, the correctness of the judgment on the merits is not attacked, but the sole point made is that the Court was imposed upon in entertaining jurisdiction, and that in truth and in fact the two trustees made defendants should have been ranged with plaintiffs and thereby the Court ousted of its jurisdiction.

If there is no precedent to be cited in support of this

proposition, it is no reason why it should be disregarded, provided that it is sound in principle.

We submit that it is without the legitimate purview of a bill of review to set aside the solemn judgment of the Court, unless it is made to appear that injustice has been done to the complaining party.

IV.

Referring now only to the attack made by the appellants upon the decree dismissing their bill, and assuming that this Court will consider the question as to whether or not the complainants were guilty of laches in filing their bill, and the order dismissing their bill should be sustained on that account, we have but little to suggest in addition to the very able opinion filed in the case by Judge Hawley. But there is one point in the case not touched upon in his opinion that we think merits attention.

Appellants did not File their Bill of Review Within the Time Allowed by Law to Take an Appeal to this Court, and Therefore their Bill of Review is Too Late.

In the opinion of Judge Hawley, contained in the record, it is conclusively shown that a court of equity will not entertain a bill of review unless it is filed within the same time the aggrieved party could have appealed to a higher Court.

An examination of the authorities cited by Judge Hawley will show that it is a general principle that an

aggrieved party to obtain a review of the errors complained of may either appeal to an appellate court, or he may file his bill of review in the same court for the same purpose. But he must elect between the two methods of procedure; he cannot have both. Also, if he waits beyond the time allowed to take an appeal he cannot have either remedy.

Now, in the case at bar, the appellants were allowed six months from the entry of the decree in the court below either to appeal to this Court or to file their bill of review. They did neither. Therefore, under well-settled principles enunciated by the courts, the complainants are too late. If it is said that the appellants took their appeal from the decree entered in the court below to the Supreme Court of the United States upon the question of jurisdiction alone, and that that was the only question they desired a decision upon, the answer is, that they elected to stand upon their appeal to the Supreme Court of the United States and not to take an appeal to this Court, and not to file a bill of review.

It is well settled that if a party is aggrieved by the judgment of the Circuit Court, and desires to have the question as to whether or not the Circuit Court had jurisdiction of the action reviewed on appeal, he may elect between two tribunals with different methods of procedure, but cannot avail himself of both. 1. He may appeal direct to the Supreme Court of the United States upon the question of jurisdiction alone after having obtained a proper certificate from the court below; or, 2, He may appeal the whole case to the Circuit Court of Appeals and there have all the questions,

including the question of jurisdiction, reviewed by that court. He must elect between the two.

If the appellants here had appealed the whole case to this Court they could have had the question of jurisdiction of the court below reviewed and decided.

United States v. *Jahn*, 155 U. S. 369;
Robinson v. *Caldwell*, 165 U. S. 359;
McLish v. *Roff*, 141 U. S. 669;
American Construction Co. v. *Jacksonville etc. R. R.*, 148 U. S. 382;
Maynard v. *Hecht*, 151 U. S. 324;
Chicago M. & St. P. R. R. v. *Evans*, 58 Fed. Rep. 433;
U. S. F. & E. Co. v. *Gallegos*, 89 Fed. Rep. 769.

In our opinion this fact is a complete answer to any argument that may be urged against Judge Hawley's decision, on the ground that it gives the aggrieved party no opportunity to file a bill of review, if he is compelled to do so before the expiration of the term at which the judgment was entered. In any event (unless he elects to appeal), he has his right to file a bill of review within six months after the rendition of the judgment, because in that time he can, if he so elects, appeal to the Circuit Court of Appeals and obtain relief. Then if this Court sees fit to do so, it can certify the case to the Supreme Court upon the question of jurisdiction, provided it is not a case in which the jurisdiction (like the case at bar), "is dependent entirely upon the opposite parties to "the suit or controversy being aliens and citizens of the "United States, or citizens of different States," for in

that case "the judgments or decrees of the Circuit Court of Appeals shall be final."

See Section 6 of the Act creating the Circuit Court of Appeals.

TO REPEAT, THE APPELLANTS HERE, HAVING THE RIGHT TO APPEAL TO THIS COURT FROM THE FINAL DECREE, OF JULY 18, 1896, AT ANY TIME BEFORE DECEMBER 18, 1896, THEY HAD ALSO, UNDER THE PRACTICE IN EQUITY CASES, THE RIGHT TO FILE A BILL OF REVIEW IN THE COURT BELOW WITHIN THE SAME PERIOD; BUT NOT HAVING DONE SO, THEY CANNOT AFTERWARDS BE PERMITTED TO AVAIL THEMSELVES OF THAT REMEDY.

This view is much strengthened by the fact, that in this particular class of cases (see Sec. 6) the decision of this Court is expressly made final upon the question of jurisdiction of the court below. In no other way can meaning be given to the provision of the law that: "the judgments and decrees of the Circuit Court of "Appeals shall be final in all cases in which the jurisdic- "tion is dependent entirely upon the opposite parties to "the suit or controversy, being aliens and citizens of the "United States, or citizens of different States."

Colorado M. Co. v. *Turck*, 150 U. S. 35;
Ex parte Jones, 164 U. S. 691;
Borgmeyer v. *Teller*, 159 U. S. 408.

The statute manifestly intends to give a litigant who questions the jurisdiction of the Circuit Court the right to choose between the Supreme Court and the Circuit Court of Appeals as his appellate tribunal.

If he selects the Supreme Court he must limit his appeal to the question of jurisdiction alone, and procure a proper certificate from the Circuit Court. If he selects the Circuit Court of Appeals he must take up the whole case, and then he must abide by the decision of that Court, if the question of jurisdiction depends upon the citizenship of the parties The appellants here allowed the six months in which they might have appealed to this Court to lapse without having done so. Therefore, under all the authorities, the time to file a bill of review also lapsed.

It is no doubt upon the theory that though the question of jurisdiction is involved, an appeal may be taken to this Court that appellants claim a hearing on their present appeal.

There are three questions before this Court: 1. Have appellants any standing in Court? 2. Are the appellants too late? 3. Did the Circuit Court have jurisdiction of the original action? The first two questions are not jurisdictional. The last question has been argued at great length and with much ingenuity by the learned counsel for appellants in their brief. This is, of course, upon the theory that this Court is at liberty to consider the matter.

If the questions of laches and of status are eliminated, then there is left only the question of jurisdiction. In such case it is doubtful if this Court could consider it.

City of Indianapolis v. *Central Trust Co.*, 83 Fed. Rep. 531;

Hastings v. *Ames*, 68 Fed. Rep. 726;

Chicago M. & St. P. R. R. Co. v. *Evans*, 58 Fed. Rep. 433.

We urge the foregoing as reasons additional to those given by Judge Hawley for dismissing the bill.

V.

We observe that the learned counsel for the appellants have assumed in their briefs that the only question before this Court is as to whether or not Judge Hawley was right in dismissing the bill for laches, and do not argue the question as to whether the demurrers should have been sustained upon the merits, except as a contingent question that may arise. But we desire to suggest here, that if this Court should be of opinion that Judge Hawley is wrong in dismissing the bill for laches, and if it decides that we also are wrong in our contention that the Court below has no right to entertain jurisdiction of a bill of review after more than the six months within which an appeal is allowed to this Court have elapsed, and that we are not justified in asking that the complainants be turned out of court because not interested, that then, and in that event, this Court should be very careful to see that its decision remanding the case cannot be used as the law of the case when the question of the merits of the bill of review comes up for consideration in the court below.

We ask the Court to affirm the judgment of the court below on the several grounds above stated. If this Court cannot affirm the judgment upon those grounds, we ask that it be affirmed on the merits,

or that the Court expressly rest its decision on the ground that upon this appeal only the question of laches is involved. As this Court may feel that it ought to dispose of the case on the merits we have taken the liberty of reprinting so much of the brief of Judge R. Y. Hayne, filed in the court below, upon the question of jurisdiction, as seems pertinent to the same contention in this court.

JUDGE HAYNE'S BRIEF.

This brief is filed upon the general question of the ranging or transposition of the parties by the Court, for the purposes of jurisdiction. The question asked which opened up the discussion was in substance this: What "controversy" has Bowdoin College, or the other complainants, with the trustees? And the implication was that if there was no "actual controversy" between said parties, the Court would transpose them so as to place the trustees on the same side as the complainants, which would deprive the Court of jurisdiction.

I.

The doctrine of ranging or transposition was (so far as we are aware) first announced in the Removal Cases (100 U. S., 457). There the plaintiff was a citizen of Iowa. One of the defendants was a citizen of Iowa; and the others were citizens of other States. Therefore — that is to say, because there was a citizen of the same State on each side of the case — it is manifest that it could not be removed to the Federal Court. But

before the parties were actually brought into Court, the interest of the defendant, who was a citizen of Iowa, practically ceased. The Court said that after this had occurred this party was a mere nominal party (p. 469); and that his existence as a party would not be allowed to stand in the way of a removal. The substance of the decision was that where the interest of a party has ceased, and he has become a nominal party, he will not be considered for purposes of the jurisdiction. This, of course, has no bearing on the case at bar; but it may be noted that the conclusion mentioned was reached for the purpose of *sustaining* the federal jurisdiction, and not for the purpose of defeating it.

The preceding case was approved in *Pacific R. R.* v. *Ketchum* (101 U. S., 289). That was a suit brought by a bondholder (secured by a third mortgage) against the debtor, and certain other incumbrances, and also against his own trustees (Vail and Fish), upon the allegation that he had requested his trustees to sue, but that they had refused to do so (p. 291). These trustees (Vail and Fish) were citizens of New York, and the plaintiff also was a citizen of New York. Such being the case, it is manifest that there were citizens of the same State on each side of the case, and that the Court had no jurisdiction. But the trustees (Vail and Fish) filed an answer, in which they admitted all the allegations of the bill, and concluded with the following prayer:

"And these defendants as trustees of the several and varied interests of the bondholders secured by said deed of trust, submit *the same* to the judgment of this Honorable Court, *that the same may be duly provided for, and protected,* and *ask*

that they may have such relief, including an allowance for the costs and expenses herein, *as to your Honorable Court may seem meet*" (p. 293).

With reference to this the Court said:

"It is needless to inquire what might have been the result if they had seen fit to dispute the right of the complainant bondholders to go on. They did not do so, but on the contrary, before the decree was rendered, *came in and substantially availed themselves of the suit which had been begun, so that in the end, the suit in legal effect became their suit.* Although nominally, defendants, according to the pleadings, they *voluntarily,* in the course of the proceedings, *arranged themselves* on the same side of the subject matter of the action with the complainants" (p. 299).

It was held that this gave the Court jurisdiction at the time it was done, and that it was immaterial whether the Court had jurisdiction before that or not. (It is to be noted that in this case also the conclusion was reached to *sustain* the jurisdiction, and not to defeat it.)

In *Blacklock* v. *Small* the suit was to set aside a satisfaction of mortgage. It grew out of the following facts: One Blacklock sold certain property in the city of Charleston, and took a mortgage to secure the purchase price. Subsequently he assigned the debt and mortgage to one Robertson in trust for his (Blacklock's) *three* children. The war broke out and the Blacklocks went to Europe and remained there until its close. In the meantime the trustee (Robertson) had accepted payment of the debt in Confederate money, and had satisfied the mortgage. After the close of the war two of the young Blacklocks became citizens of Georgia, and the third (Helen Robertson Blacklock) remained a citizen of South

Carolina. The trustee and the owner of the property were citizens of South Carolina. The two Georgia Blacklocks commenced a suit in the U. S. Circuit Court against the trustee and the owner (citizens of South Carolina), and against the third Blacklock (also a citizen of South Carolina as aforesaid) to have the satisfaction of the mortgage set aside, and a decree that the debt be paid in lawful money. It is manifest that the interest of the third Blacklock was identical with those of the complainants; *and no reason whatever was given in the bill for joining her as a defendant.* Moreover, the prayer of her answer stated that she

"*joins in the prayer of the bill* that the pretended payments of the bond by Small to Robertson, and the satisfaction entered on the mortgage be declared null and void, that the bond and mortgage be declared valid and subsisting obligations of Small to Robertson, as the trustee of a trust for the benefit of the defendant, and her sisters, and that Small be decreed *to pay the defendant and the plaintiffs the amount of money secured by the bond and mortgage.*" (p. 99.)

Upon these facts it was held that there was no jurisdiction in the Federal Court; and Mr. Justice Blatchford, delivering the opinion, said :—

"The relief asked in the suit must necessarily be for the benefit of the defendant, Helen Robertson Blacklock, as well as for the benefit of the plaintiffs, especially as, by her answer, *she ranges herself* on the side of the plaintiffs as against Small, *joins in the prayer of the bill,* and asks," etc. (p. 104.)

Bland v. *Fleeman,* 29 Fed. 669, is of a like nature. That was a suit by heirs against the admin-

istrator. Several co-heirs (among whom was W. W. Adams, a citizen of the same State, with complainants) were joined as defendants. The Court said :—

"The answer of W. W. Adams, and the other defendant heirs, adopts the bill of the plaintiffs, declares it true in all its allegations, *and they pray in such answer for the same relief as that asked for by the plaintiffs.*" (p. 671.)

In so far as the preceding case proceeds on other grounds, it was expressly disapproved in *Rich* v. *Bray*, 37 Fed. 279; *Cilley* v. *Patten*, 62 Fed. 500; *Belding* v. *Gaines*, 37 Fed. 817, to which latter case the attention of the Court is directed.

Now, admitting for the sake of argument, that jurisdiction which existed in the beginning may in some cases be defeated by what occurs subsequently, it is apparent that there was nothing of the kind in the case at bar. In the cases cited, the defendants in question *became the actors by joining with the complainants in the prayer for relief.* The importance of the prayer for relief in equity pleading is well known (Story Eq. Pl., Sec. 40 and Sec. 43), and the defendants in question could not be allowed to pray for the same relief as that prayed for by the complainants, and yet be ranked as defendants.

In the case at bar there is no shadow of foundation for such a course. The answer of Stanly and Purington *has no prayer at all.* They do not deny any allegation of the bill except that they deny that they are in possession of some of the property described in the deed of trust. Of course, they were not required to deny anything which was the truth. The law does not encourage

perjury on the part of anybody; and it is to be noted that among the matters admitted is their refusal to take action to protect the trust. This is, in effect, a continuation of their refusal to take such action. Besides, the issue as to the amount of the property they hold in trust is a substantial one. And, as above stated, the absence of any prayer on their part is of itself a complete distinction from any possible construction of the authorities cited. There was, therefore, nothing subsequent which would change the operation of Judge Hawley's decision, and therefore it must control.

II.

In *Dodge* v. *Woolsey* a stockholder of a corporation requested the directors to sue to enjoin the collection of a tax which he claimed to be invalid. The directors said that

"they fully concurred with Woolsey in his views as to the illegality of the tax; that they believed it in no way binding upon the bank, but that *in consideration of the many obstacles in the way of resisting the collection of the tax in the Courts of the State* they could not consent to take legal measures for testing it" (p. 345).

Thereupon the stockholder (who was a citizen of another State) brought suit in the Federal Court and got judgment. Upon appeal it was argued that the demand and refusal to sue was "a mere contrivance" to give the Federal Court jurisdiction. But the Court said that this was

"the assertion of a fact which does not appear in the case, one which the defendants should have proved if they meant to rely upon it to abate or defeat the complainant's suit, and that

not having done so, *as they might have attempted to do,* we cannot presume its existence."

And the judgment was affirmed.

Dodge v. *Woolsey*, 18 How., 331.

The above rule was approved in *Memphis* v. *Dean,* in which Mr. Justice Nelson delivering the opinion, said:

"The judgment of the Court in the case of *Dodge* v. *Woolsey* authorizes the stockholder of a company to institute a suit in equity in his own name against a wrong-doer whose acts operate to the prejudice of the interest of the stockholders, such as diminishing their dividends and lessening the value of their stock, in a case where application has first been made to the directors of the company to institute the suit in its own name, and they have refused."

Memphis v. *Dean*, 8 Wall., 73.

It will perhaps occur to the Court that the above cases arose and were decided before the passage of the Act of 1875. But the fact of collusion to make a case of jurisdiction was as potent a plea before the Act of 1875 as afterwards. This is expressly recognized in the passage just quoted. The difference was that the objection had to be taken *by the party*, who could only take it at a particular stage of the case. The Act did away with these restrictions. It provided that the objection could be taken by the Court of its own motion, and that this could be done "at any time." Such was the purpose and object of the Act.

Hartog v. *Memory*, 116 U. S., 590.

Morris v. *Gilmer*, 129 U. S., 326.

Nashua R. R. v. *Lowell R. R.*, 136 U. S., 374.

Farmington v. *Pillsbury*, 114 U. S., 144.

In our view, in cases where the objection was raised by the party at the proper time and in the proper manner, the question was precisely the same before the Act of 1875 as afterwards; and, therefore that the cases above cited are authority.

The case, however, has been approved after the Act of 1875, and after the announcement of the doctrine of ranking the parties upon which our learned friends rely.

In *Hawes* v. *Oakland*, 104 U. S., 450, the subject came under consideration. The Court affirmed the judgment dismissing the bill, because it thought that the stockholder had not sufficiently exhausted his remedies to induce corporate action—he might have called a stockholders' meeting. But it remarked upon the general subject of collusive suits, and seemed to think that as a matter of fact there was collusion in the particular case then before the Court. But it was far from disapproving the doctrine of *Dodge* v. *Woolsey*. On the contrary, it approved it. Mr. Justice Miller, delivering the opinion, said that the principles of that case "have received more than once the approval of this Court" (p. 452), and that the case "was manifestly well considered," and was not "justly chargeable with the abuses we have mentioned" (p. 457). In other words, there was a clear recognition of the soundness of the rule laid down in *Dodge* v. *Woolsey*, coupled with an admonition to the lower courts that under the Act of 1875 they had power to prevent abuses of their jurisdiction without waiting for the parties to act.

The subject again came under consideration in *Greenwood* v. *Freight Co.*, 105 U. S. 16, and it was expressly

decided that a stockholder could maintain a suit to protect the rights of the corporation where the directors refused to do so. Mr. Justice Miller, who delivered the opinion, said that the whole subject had been considered in *Hawes* v. *Oakland*, and that the rule laid down in that case "authorizes a shareholder to maintain a suit to prevent such a disaster, where the corporation peremptorily refuses to move in the matter." Now, the corporation was a defendant in the case. Its interests were just as much with the complainant as are those of Judge Stanly here. The doctrine as to "ranking" was well known. Why was it not applied, if it had any application? Is this Court to impute neglect to the distinguished counsel who argued the case, and ignorance to the high tribunal which decided it? How else can the decision be evaded? We submit that it is conclusive of the proposition, and binding upon this Court.

The subject again came under consideration in *Detroit* v. *Dean*, (106 U. S. 541). The court held that, as a matter of fact, "the refusal to take legal proceedings in the local courts was a mere contrivance, a pretense, the result of a collusive arrangement to create for one of the directors a fictitious ground for Federal jurisdiction." But it expressly recognizes the right of the stockholder to sue in the Federal Court, in case of a genuine refusal by the corporation. And Mr. Justice Field, delivering the opinion, said: "The opinion in the case of *Hawes* v. *Oakland* is full of instruction on this head, and to it we refer for a statement of the law; we can add nothing to its cogent reasoning." Now, as the opinion in *Hawes* v.

Oakland expressly approves the doctrine of *Dodge* v. *Woolsey*, what was said by Mr. Justice Field shows that the doctrine of *Dodge* v. *Woolsey* is regarded as sound doctrine; and that covers the case at bar.

A case similar in principle is *Reinach* v. *A. & G. W. R. R.*, 58 Fed. 33. There a bondholder was allowed to maintain a proceeding in the Federal Court for the foreclosure of a mortgage, the trustee having refused to act. The Court said:

> It does not, however, follow that where the *cestui que* trust is himself the complainant, *the jurisdiction of the Court will be ousted by the citizenship of his trustee*" (p. 38).

See also:

Hotel Co. v. *Wade*, 97 U. S. 19;
Mercantile Co. v. *Texas Ry.*, 51 Fed. 536;
Alexander v. *Central Ry.*, 3 Dillon, C. C. 487;
Belding v. *Gaines*, 37 Fed. 813.

The above cases decided by the Supreme Court of the United States, are, we respectfully submit, conclusive of the question and binding upon this Court.

The cases cited by the learned counsel are not in point. The case of *Robinson* v. *Anderson*, 121 U. S. 522, related solely *to the existence of a federal question.* There was no question as to citizenship in the case. The other cases cited are of three classes. The first class consists of cases where the defendants in question *joined in the prayer of the complaint*, and so became actors in the case. These cases are fully considered under the first head of this brief. There was nothing of the kind in the case at bar.

The second class consists of cases where collusion actually existed. *Detroit* v. *Dean*, 106 U. S. 541, and *Williams* v. *Nottawa*, 104 U. S. 209, are examples of this class.

The third class consists of cases where, by the rules of pleading, the defendants in question ought to have been joined as complainants, *and no reason for not doing so was alleged in the bill.* Of this class is *Rich* v. *Bray*, 37 Fed. 273. That was a suit by certain heirs against co-heirs, one of whom was charged with wrong-doing in connection with the property. One of the co-heirs was Minnie G. Kinsey, whose citizenship was the same as that of the complainants. No wrong was charged against her; and no reason was alleged for joining her as a defendant. The Court said:

"Why is she joined as a co-respondent? *No reason whatever is assigned therefor*" (p. 279).

Covert v. *Waldron*, 33 Fed. 311, proceeds upon the same principle, though the opinion is brief.

These latter cases would be in point if no refusal of the trustees to sue had been alleged. Such refusal constitutes the reason for joining them as defendants. And if the Court believes that the refusal was genuine, it is a sufficient reason.

III.

We have already stated that the authorities cited are conclusive of the question and binding upon this Court. But the question as to what actual controversy the complainants have with the trustees is further disposed of by a consideration of the language of the provision

invoked by the learned counsel. That provision does not require that there should be any such actual controversy in a case which depends upon the citizenship of the parties. It is as follows:—

Sec. 5. "That if in any suit commenced in a Circuit Court, or removed from a State Court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly *within the jurisdiction* of said Circuit Court, or that *the parties* to said suit have been improperly or collusively joined, either as plaintiffs or defendants, *for the purpose of creating a case* cognizable or removable under this Act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit, or remand it to the Court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; but the order of said Circuit Court dismissing or remanding said cause to the State Court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

U. S. Stat. at Large, Vol. 18, Pt. 3, p. 472.

The clause of the above provision which seems to be relied on is, that which says that the suit may be dismissed or remanded, if it appears "that such suit does not really and substantially *involve a dispute or controversy* properly within the jurisdiction of said Circuit Court." And the idea appears to be that this means, not merely that such dispute or controversy must be *involved* in the case; but that there must be an actual dispute or controversy with *each* defendant—in other words, that some *relief* must be prayed against each and every one of the defendants.

We submit that the clause above quoted does not apply to the parties at all. It applies to cases where

jurisdiction is claimed by reason of the alleged existence of a federal question. That the above clause applies where jurisdiction is claimed by reason of the existence of a federal question has been expressly decided. In *Robinson* v. *Anderson* (121 U. S. 522), cited by counsel, jurisdiction was claimed by reason of the existence of a federal question. But when the answer came in it was seen that no such question was really involved. The Supreme Court affirmed a decree dismissing the suit; and Chief Justice Waite, delivering the opinion, said:—

"The provision in Section 5 of the Act of 1875, requiring the Circuit Court to proceed no further, and dismiss the suit when it satisfactorily appears that 'such suit does not really and substantially involve a dispute or controversy properly within' its jurisdiction, applies directly to this case as it stands on the pleadings. The answers show that the case made by the complaint was fictitious and not real."

Here we have a decision of the Supreme Court of the United States applying the clause in question to cases where jurisdiction is claimed by reason of the alleged existence of a federal question. Does the clause also apply to cases where jurisdiction is claimed by reason of the citizenship of the parties? We submit that it does not. There is a separate clause which completely covers the subject of parties; and this separate clause begins in the disjunctive. After the first clause comes the second, viz.: "or that *the parties* to said suit have been *improperly* or *collusively* joined either as plaintiffs or defendants *for the purpose of creating a case* cognizable or removable under this Act."

It will be noted that the second clause is complete and full on the subject of parties, and covers every case of

imposition on the jurisdiction by reason of the citizenship of the parties. It renders abortive all connivance and secret understandings in reference to the joinder of parties or the foundation on which such joinder rests. It goes further. It renders nugatory all *improper* joinders "for the purpose of creating a case cognizable or removable under this Act." These two grounds are separate and distinct. A joinder may be "improperly" made for the purpose of creating a case, etc., although there was no collusion. The party improperly joined as a defendant, for example, might not have known anything about what was being done. But the two grounds together completely cover the subject of parties. Now, if the case of parties *also* falls within the first clause, *i. e.*, is covered by the words "a dispute or controversy properly within the jurisdiction," what was the use of adding the second clause? Would not such a construction render the second clause useless? If so, does it not violate the established canon of construction that some operative effect must be given to every word of a statute, if it can be done?

"It is the duty of the Court to give effect, if possible, *to every clause and word of a statute*, avoiding if it may be any construction which implies that the legislature was ignorant of the meaning of the language it employed."

Montclair v. *Ramsdell*, 107 U. S. 152.

It is unnecessary to multiply authorities as to this rule of construction. It is familiar and fundamental, and it would be grossly violated by saying that the case of parties which is so completely and fully covered by

the second clause of the provision quoted is also within the operation of the first.

It cannot be possible that the second clause was intended to superadd a requirement to the first, and that a case must fall within *both* clauses. Suppose that a case *does* involve a federal question. No question could then arise as to improper or collusive joinder of parties "for the purpose of creating a case," etc. On the other hand, if the requisite citizenship exists, and the joinder was *properly* made, without collusion, and *not* for the purpose of "creating a case," etc., the Court can not superadd any requirement as to the nature of the controversy. Such a construction would violate the constitutional right of a party, having the requisite citizenship to come into the Federal Courts—a right which has been affirmed by every Act of Congress on the subject from the foundation of the Government to the present time. The provision would cease to be a mere safeguard against imposition, but would cut down the jurisdiction at least one-half.

Furthermore, it renders the use of the disjunctive "or" entirely inapt and inappropriate.

We submit, in conclusion of this head, that the provision was intended to cover the main grounds upon which litigants may come into the Federal Courts, viz.: first, by reason of the nature of the question; and, second, by reason of the citizenship of the parties. The first clause of the provision covers the first of these grounds, and the second clause covers the other. This construction accords with what has been decided to be the purpose of the provision.

Hartog v. *Memory*, 116 U. S. 590;
Morris v. *Gilmore*, 129 U. S. 326.
Nashua R. R. v. *Lowell R. R.*, 136 U. S. 374.

The object of the provision in question was not to cut down the jurisdiction of the Court, but to enable it to protect itself against frauds and imposition.

Farmington v. *Pillsbury*, 114 U. S. 144.

If our construction be the true one, the question, What controversy is there between the complainants? is rendered immaterial.

IV.

But there *was* a "dispute or controversy" with the trustees, if their refusal to take action was genuine. We think the evidence read at the oral argument sufficiently shows that such refusal was genuine. The answer *admits the refusal*, and is, in effect a continuation thereof. This placed the parties in an antagonistic attitude. In the case of *Dodge* v. *Woolsey*, above cited, the trustees of the bank "fully concurred" in the views of the stockholder, but said: "in consideration of the many obstacles in the way of testing the law in the Courts of the State, we cannot consent to take the action we are called upon to take" (18 How., p. 340). With reference to this, the Supreme Court said the directors and the stockholder "occupy *antagonistic* grounds in respect to the controversy, which their refusal to sue forced him to take in defense of his rights as a shareholder in the bank" (p. 346).

Not only so, but the answer of the trustees *disputes the fact* that they have as much real property as is

charged by the bill. Surely, here is a "dispute or controversy!" Our learned friends will not, on reflection, go so far as to say that there must be angry feelings, or anything in the nature of a row between the complainants and the defendants. Nor will they say there can be only one "dispute or controversy" in a suit in equity. Such suits may, and usually do, involve a great number of controversies of different degrees of importance. True it is that the controversy between the complainants and the trustees is not the main controversy in the case. But will our learned friends contend that the main controversy in the case must be with each separate defendant?

Under the rules of equity pleading there are many cases of persons who are "properly" joined as defendants, though there is only a shade (if there is any) actual controversy between the parties. The most common instance of this is the case of a stakeholder. Suppose that a stakeholder, who is made a defendant, comes in and says in his answer, that he believes the complainant to be entitled to the money held by him, and wishes him to succeed; but that he does not propose to take any risk in the matter, and offers to do what the Court shall think proper. Would the Court say that he must be transposed, and that the fact that he was a citizen of the same State with the other defendant defeat the jurisdiction?

Suppose that in a suit for foreclosure, a subsequent incumbrancer, who is joined as a defendant, avers in his answer that it is a matter of indifference to him whether

the property is sold under the order of the Court, or not; but asks that in case a sale is had, his interest should be protected. Would it be said that he had no "controversy" with the complainant, and must, therefore, be ranked as plaintiff, and that his citizenship of the same State with the other defendants defeated the jurisdiction?

Take the case of a defendant in a suit to quiet title! If one of several such defendants, having a color of claim, should come in, file a disclaimer, would his citizenship of the same State with the other defendant defeat a jurisdiction otherwise existing? How would it be if he were the only defendant? Does a disclaimer oust the Federal Court of jurisdiction over an action to quiet title?

These, and many other similar joinders, are permitted by the rules of equity pleading. And we submit, in the words of Judge Caldwell, that:

> "By no rule of law or logic can the contention be supported that the rules of chancery pleading as to parties shall be abrogated, and a rule the converse of that which has obtained from time immemorial adopted, in order to deprive a citizen of another State from his constitutional right to sue in this Court."
>
> *Belding* v. *Gaines*, 37 Fed. 819.

It is to be remembered in this case that the complainants are at least *prima facie* entitled to come into the Federal Court because they are citizens of another State, as against the Merritts, who are citizens of California, and that the question is whether such a *prima facie* case of jurisdiction is to be *defeated* by undoing the disposition which the pleader has made of the trustees.

One further remark and we have done. If the refusal of the trustees to take action was genuine, the pleader *could not* have joined them as co-complainants. Therefore, when the bill was filed, the suit was rightfully brought, and the Court had jurisdiction. There has been no change of heart on the part of the trustees since then in this regard. They admit by their answer that they would not and will not sue. How, then, does what was rightful in the beginning become wrongful? The Court will not say that the law gives the complainants the right to come into the Federal Court, but ordains that it is the duty of the Court to immediately kick them out again. Such a construction would lead to an absurdity; and such constructions are not to be adopted.

U. S. v. *Kirby*, 7 Wall. 483.

We respectfully ask that the judgment of the court below dismissing the Bill of Review be affirmed.

OLNEY & OLNEY,

Solicitors for John A. Stanly, Surviving Trustee, and John A. Stanly, Asbury J. Russell, and Peter L. Wheeler, Trustees of the Samuel Merritt Hospital.